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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Michael J. an individual,

Plaintiff,

v.

CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS; CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS; CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS; REDDING CALIFORNIA STAKE OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS; 2ND WARD OF REDDING STAKE OF CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS; SIMI VALLEY STAKE OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS; LOS ANGELES STAKE OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS; FREDERICK HILLIARD JR.; CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF

CASE NO. 2:08-cv-7553

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

Hearing:
Date: December 15, 2008
Time: 1:30 p.m.
Location: 15

Assigned to the Honorable Percy Anderson

LATTER-DAY SAINTS; CORPORATION OF THE PRESIDENT OF THE CALIFORNIA LOS ANGELES MISSION, THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS; 3RD WARD OF REDDING STAKE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; SIMI VALLEY STAKE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; REDDING STAKE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; LOS ANGELES STAKE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; 2ND WARD OF THE REDDING STAKE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; and DEFENDANT DOES 10 through 1000, inclusive,

Defendants.

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I.

INTRODUCTION

This diversity case has been removed from the state court. Twenty-six-year old Plaintiff Michael J. contends that the various church entity defendants (collectively, the "LDS Church") failed to protect him, while a minor, from a sex predator. He alleges that this sex predator was a "priest" and a "teacher's aid" of the LDS Church. He says the LDS Church had a special relationship with him and duty to protect him. He does not claim himself to be a member of the LDS Church.

The central question is whether a church has a duty to protect somebody from the torts committed by one of its ordinary members. Although Plaintiff tries to dress up his theories by calling the predator a "priest," a "priest" in the LDS Church is nothing more than a mere member. The Complaint engages in very vague pleading to avoid identifying this weakness in its case, but in doing so the Complaint requires this Court to become entangled in LDS Church procedure and polity.

The Complaint is defective under Rule 12(b)(6) of the Federal Rules of Civil Procedure because it does not state a claim for relief. The Complaint fails to sufficiently allege that the LDS Church had a duty to protect one member from sexual abuse by another. The Complaint alleges direct and vicarious torts against the LDS Church, but these are not available against religious entities. Finally, the Complaint fails by reason of an inability to meet the requirements of California Code of Civil Procedure section 340.1, a statute which requires the Plaintiff to file certain certificates of merit, which he has not.

II.

BACKGROUND

A. Facts

Plaintiff claims that he was sexually abused as a child by Defendant Frederick Hilliard, Jr. ("Hilliard"). First Amended Complaint ("FAC") ¶ 1. Along with Hilliard, Plaintiff named eight purported LDS Church entities as co-defendants.

Plaintiff alleges that Hilliard was a "priest" in the LDS Church. FAC ¶ 1. Plaintiff alleges that Hilliard, "by virtue of his unique authority and position as a priest in the Church of Jesus Christ of Latter Day [sic] Saints, [was able] to identify vulnerable victims." FAC ¶ 28. However, this vague pleading implies agency when there is nothing like that for "priests" in the LDS Church. In LDS Church theology, a "priest" is merely a teenage boy or perhaps an adult who has not progressed beyond his teenage title. *See* Victor E. Schwartz & Leah Lorber, *Defining Duty of Religious Institutions to Protect Others: Surgical Instruments, Not Machetes, Are Required,* 74 U. Cin. L. Rev. 11, 53 (2005) (The term "priest" implies "no ecclesiastical authority or prestige . . . . [V]irtually every male over the age of twelve holds an essentially honorific priesthood title of some sort," and usually denotes a "teenage boy").[1]

Plaintiff alleges that "concerns were raised to church officials about Hilliard and his interaction with children." FAC ¶ 2. Purely on information and belief, Plaintiff alleges further that "prior complaints of sexual abuse committed by Hilliard were made to church officials" and that the LDS Church officials ignored these complaints and "instead allowed Hilliard to move across the county to continue molesting children, including Michael." FAC ¶ 2.

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[1] Males 12-13 are Deacons; 14-15 are Teachers; 16-18 are Priests; adult males 18-40 are generally Elders; and those over 40 are generally High Priests. An adult male may be a "priest" if he has not progressed to the adult honorifics.

Plaintiff alleges that the LDS Church "breached their duty of care to the minor Plaintiff by allowing the Perpetrator to come into contact with the minor Plaintiff without supervision." FAC ¶ 30. The LDS Church is alleged to have failed to investigate facts about Hilliard. *Ibid.* Plaintiff was "entrusted to" the care of the LDS Church, and the LDS Church "owed Plaintiff, a minor child, a special duty of care." FAC ¶ 27.

Plaintiff also alleges that Hilliard was "hired and retained . . . in the position of trust and authority as a teacher's aid." FAC ¶ 38. Nowhere, however, does the FAC allege that the LDS Church is a school or even an employer. Nor does the FAC plainly allege that Plaintiff was a student subject to a teacher's aid, nor even that Plaintiff was a member of the LDS Church.[2]

B. Procedure

Plaintiff filed his First Amended Complaint on October 10, 2008. On November 14, 2008, LDS Church, joined by Hilliard, removed the case to this Court based on diversity jurisdiction. That same day, counsel for LDS Church and Plaintiff met and conferred regarding the filing of this motion. Declaration of Courtney Vaudreuil, ¶ 2.

III.

ARGUMENT

A. Standard of Review

A complaint may be dismissed when a plaintiff fails to state a claim upon which relief may be granted. Fed. R. Civ. Proc. 12(b)(6). Such a failure may occur where there is "(1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim." *Robertson v. Dean Witter Reynolds, Inc.*, 749

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[2] Indeed, the Complaint falsely alleges the "teacher's aid" fact. The original Complaint mistakenly contained many paragraphs about a different plaintiff in a different Superior Court case with different defendants. The FAC failed to clean up the cut-and-paste errors.

F.2d 530, 534 (9th Cir. 1984).

In considering a motion to dismiss, "[r]eview is limited to the contents of the complaint and all allegations of material fact are accepted as true and construed in the light most favorable to the plaintiffs." *National Abortions Federation v. Operation Rescue*, 8 F.3d 680, 681 (9th Cir. 1993). Ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir. 1973). However, the Court is not "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). The complaint must still plead "enough facts to state a claim for relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). The Court may dismiss a case without leave to amend if the amendment will not cure the defect. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

B. Plaintiff Has Not Stated Claims for Direct or Vicarious Torts

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure should be granted if the complaint does not proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). "The elements of actionable negligence are a duty to use due care and a breach of that duty which proximately causes the plaintiff's injuries." *Wright v. City of Los Angeles*, 219 Cal. App. 3d 318, 344 (1990).

The Seventh and Eighth Claims are for direct or vicarious torts. California Civil Code section 1708.5 establishes liability for any person who commits a sexual battery upon another. Cal. Civ. Code § 1708.5(a). It further states that "a *person who commits a sexual battery* upon another is liable to that person for damages." *Id.* at § 1708.5(b) (emphasis added). There is no basis for extending this cause of action beyond the alleged abuser, Hilliard, to the LDS Church. Cases discussing section 1708.5 recognize that it is a specific intent

statute, and Plaintiff has alleged no facts to suggest that the LDS Church intended to abuse the Plaintiff. *See, e.g.*, *Angie M. v. Superior Court*, 37 Cal. App. 4th 1217, 1225 (1995) ("A cause of action for sexual battery under Civil Code section 1708.5 requires the batterer intended to cause a 'harmful or offensive' contact and the batteree suffer a 'sexually offensive contact.'")

Moreover, charitable organizations are not liable for the direct sexual abuse torts of their agents. A church simply is not responsible for the sexual assaults of its volunteers and agents because that conduct is outside the scope of a volunteer's or agent's scope of employment. *See Mark K. v Roman Catholic Archbishop of Los Angeles*, 67 Cal. App. 4th 603, 609 (1998) (*respondeat superior* may not impose liability on a religious institution for childhood sexual abuse perpetrated by a member of its clergy, as any abuse is outside the scope of a cleric's employment); *Alma W. v. Oakland Unified School Dist.*, 123 Cal. App. 3d 133, 143 (1981) (school and janitor); *Rita M v. Roman Catholic Archbishop*, 187 Cal. App. 3d 1453, 1461 (1986) (Archbishop and priest); *Jeffrey E. v. Central Baptist Church*, 197 Cal. App. 3d 718, 722 (1988) (church and Sunday School teacher); *see also Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 218 n.11 (1991) (city and adult police officer).

C. The Complaint Does Not Plead Duty

Too much of what the Complaint pleads towards establishing a duty requires the Court to weigh and consider LDS Church doctrine, procedure and polity. The Supreme Court, however, has said that courts should not entangle themselves with the "resolution of quintessentially religious controversies." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 720 (1976); *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988), citing *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (under the Establishment Clause, government action is improper if it requires "excessive entanglement between church and state").

It would be improper entanglement on the Court's part to sort out the

type of secular and ecclesiastical control a Church may or should have over members, who come in all stripes, from saints to sinners, from every Sunday attenders to non-attenders and from true believers to active apostates. Some of the questions the Complaint poses, as currently drafted, include: (1) Does a Church have a duty to protect one member against another? (2) Should a Church use ecclesiastical compulsion ("do what we say, turn yourself in, or you'll pay in the hereafter") to protect one member from another? (3) If a Church calls a mere member a "priest," does that mean the "priest" is automatically an agent for the Church? (4) Should a Church hire an investigator before it admits persons to membership or before it lets new members, or teenage members or "priests" work with the youth? (5) Should a Church permit volunteers to work with youths, even if they have odd characteristics, such as an unusual desire to work with youths?

As to his First, Second, Third, Fourth and Fifth Claims for Relief for negligence, Plaintiff, first and foremost, alleges that Plaintiff was entrusted to the LDS Church as a minor and that as such the LDS Church owed a "special duty of care." There is, however, no "special relationship" between a church and its parishioners, minor or otherwise. *Roman Catholic Bishop v. Superior Court*, 42 Cal. App. 4th 1556, 1568 (1996), citing *Nally v. Grace Community Church,* 47 Cal. 3d 278, 293 (1988). California Supreme Court Justice Mosk explained that the reason for this rule is the state judiciary's "lack of competence in matters of religion" under the First Amendment Establishment and Free Exercise Clause.[3] *Smith v. Fair Employment & Housing Com.*, 12 Cal. 4th 1143, 1182 (1996) (Mosk., J, concurring). Who is to say whether a religion is operating correctly, or that it is providing the right environment for children, or that it must investigate the background of its members who might come into casual contact with children?

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[3] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

Because of the First Amendment, that certainly is not the place of the judiciary.

Thus, the question becomes whether the Complaint adequately pleads some other duty. The Complaint makes a weak attempt to invoke the concept of a "school." There is a special relationship between a secular school and its students. *See Hoff v. Vacaville Unified School Dist.*, 19 Cal. 4th 925, 947 (1988). A "school" does not, however, mean a "Sunday School" or a classroom for religious devotion; a "school" provides state-mandated secular education to minors in the form of one of an "elementary school, junior high school, four-year high school." Cal. Penal Code § 626; *California Statewide Communities Development Authority v. All Persons*, 40 Cal. 4th 788, 803 n.8 (2007) (a church may provide a state-mandated secular education).

With *ipse dixit*, the Complaint pleads the mere fact Hilliard was a "qualified teacher's aid for a student with special needs" but does not plead that the LDS Church is a school. FAC ¶ 42. That simple artifice should not be used to evade all the law discussed above. The Complaint, if it wants to pursue this false theory, should plead that the LDS Church is not only a religion but a "secular" school. Secular schools operated by religions are required to be licensed, and the LDS Church is not on the California Department of Education list of schools required to be licensed. *See* Request for Judicial Notice (California Department of Education), *available at* http://www.cde.ca.gov/sp/ps/rq/ap/search.asp (accessed Nov. 21, 2008). Religious Sunday Schools are not obviously meant to create a "special relationship," as virtually every religion has systematic catechism in place to educate its youth.

The Complaint alleges a variety of other duties, to supervise, retain, investigate and inform. FAC ¶ 30. However, these theories rest upon the faulty assumption that a "priest" is somebody the LDS Church can control through secular means, such as a Catholic priest or a Protestant pastor. The Complaint pleads that Hilliard was a "priest," but under fundamental Christian theology, as

well as LDS Church theology, all male members of the LDS Church were, are or will become priests. *See* 1 Peter 2:5 NIV ("you also, like living stones, are being built into a spiritual house to be a holy priesthood, offering spiritual sacrifices acceptable to God through Jesus Christ"); Rev. 1:6 NIV ("has made us to be a kingdom and priests to serve his God and Father"). In the LDS Church, a clergyman-agent's title is not "priest," but either "bishop" or "stake president." *Doe v. Corporation of the President of the Church of Jesus Christ of Latter-day Saints*, 167 P.3d 1194, 1198 n.4 (Wash. App. 2007). The Complaint needs to plead that Hilliard is something other than a mere member of the LDS Church (because the word "priest" means "member"), and that he has agency responsibilities for the LDS Church.

Unless the Complaint pleads less vaguely (and such vagueness treads directly upon First Amendment principles in the way the LDS Church operates as a church and uses names to describe internal operations), there is no duty to hire, train, supervise or investigate. In *Federico v. Superior Court,* 59 Cal. App. 4th 1207 (1997), a young man was hired to work in a beauty college as a hair stylist. He had a long criminal history of molesting minor children. The beauty college did no background check, and was sued when the stylist molested a minor who came to the school for a haircut. *Id.* at 1211-12.

The *Federico* court noted that despite a clear issue of fact as to notice, "we conclude the trial court should have granted defendants' motion for summary judgment." *Id.* at 1212-13. The *Federico* court explained that "an employer's liability must be determined in the context of the specific duties the work entails." *Id.* at 1215. It was certainly foreseeable that the *Federico* perpetrator would come into contact with young males in his employment, but an "employer is not charged with guaranteeing the safety of anyone his employee might incidentally meet while on the job against injuries inflicted independent of the performance of work-related functions." *Id.* In other words, similar to the *respondeat superior* cases, incidental

meetings that lead to injuries which are "independent" of the duties of the perpetrator's job are not subject to a duty of care.

Given the fact that virtually every male member of the LDS Church above the age of eleven has an honorific priesthood title of some sort, the duty to screen or investigate would be enormous. The allegations seek to impose duties barred by the First Amendment. There is no duty to investigate, and even if the LDS Church learned that Hilliard was a child molester, there was no duty to keep him away from other members.

In the absence of a "special relationship," it would be most difficult to find that the LDS Church had a duty to warn one member about another. *Thompson v. County of Alameda,* 27 Cal. 3d 741 (1980), is instructive. In an appeal from demurrers, the California Supreme Court was asked to decide whether there was a duty when a county government knew that a particular incarcerated person had "extremely dangerous and violent propensities regarding young children and that sexual assaults upon young children and violence connected therewith were a likely result of releasing [him] into the community." *Thompson,* 27 Cal. 3d at 746. A few hours after his release, the violent felon murdered the plaintiff's son who lived a few doors away. The Supreme Court held that no duty to supervise or warn existed because the county government did not have a special relationship with the plaintiff. *Id.* at 754. The Court noted that the victim was not a "specifically known and designated individual[]" and held that there is no duty to issue "generalized warnings." *Id* at 755. Moreover, it was simply "conjecture" to assume that others, including the felon's mother, would take steps to ensure the public had adequate warnings issued. *Id.* at 757.

Authorities which hold that there is no duty imposed upon a Church to protect one member from another are many. *Bryan R. v. Watchtower Bible and Tract Society of New York, Inc.*, 738 A.2d 839, 848 (Me. 1999) (church had no duty to protect minor congregant from sexual abuse by adult congregant or to warn

of prior abuse; "The creation of an amorphous common law duty on the part of a church or other voluntary organization requiring it to protect its members from each other would give rise to both unlimited liability and liability out of all proportion to culpability."); *id.* at 849 (dismissing claims for emotional distress; "We have never recognized a relationship between churches and their members of the type that would give rise to a duty to avoid psychic injury to those members . . . ."); *Doe v. Corporation of the President of the Church of Jesus Christ of Latter-day Saints*, 98 P.3d 429,432 (Utah App. 2004) (church had no duty to warn of congregant's prior acts of child sexual abuse; "[W]e conclude that no special relationship existed between [the church] and Tilson [the abuser] at the time Plaintiffs were sexually molested that would give rise to a duty on [the church's] part to warn Plaintiffs about Tilson. . . . [W]e also reject Plaintiffs' argument that [church] membership alone was sufficient to establish a special relationship between [the church] and Plaintiffs that created a duty on [the church's] part to warn Plaintiffs about Tilson."); *Meyer v. Lindala*, 675 N.W.2d 635, 640-41 (Minn. App. 2004) (church had no duty to protect victims of sexual abuse from fellow congregant; "Providing faith-based advice or instruction, without more, does not create a special relationship. . . . Because there is no special relationship [between the church and the victims], there is no duty, and we need not reach the issues of breach or causation."); *Berry v. Watchtower Bible and Tract Society of New York, Inc.*, 879 A.2d 1124, 1130 (N.H. 2005) (church had no duty to protect minors from abuse by their father which was reported to the church by their mother; "[T]here is no common law duty running from Watchtower and Wilton Congregation to the plaintiffs and the trial court's ruling that a duty existed requiring [them] to dispense 'common sense advice to the church member and a reporting of the abuse to the authorities' is erroneous as a matter of law.").

D. The Complaint Does Not Plead Notice

For child abuse victims claiming after their 26th birthday that they

were abused as minors, and that an entity "who owed a duty of care to the plaintiff" failed that duty (Cal. Civ. Proc. Code § 340.1(a)(2))[4], the plaintiff must plead that the "entity knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative or agency and failed" to take steps to protect the minor. Cal. Civ. Proc. Code § 340.1(b)(2).

The California Supreme Court has explained what this notice pleading requires. Under *Doe v. City of Los Angeles,* 42 Cal. 4th 531 (2007), it was insufficient to plead notice by referring to allegations that the perpetrator's "tendencies" were "commonly known" by reason of his "inappropriate fraternization" with minors, and his "alleged association with a known pornographer." To charge a charitable organization with a reason to know, the Complaint must state "that a person would have inferred the existence of the ultimate fact or would have regarded the existence of the ultimate fact as so *highly probable* as to have behaved in conformity with that belief." *Id.* at 547 (emphasis added). *Doe v City of Los Angeles* also eschews "boilerplate" pleading of notice. So, on the basis of what Plaintiff actually knows, there is no notice pleaded.

To hold a "nonperpetrator entity" liable under section 340.1(b)(2), plaintiff must allege that the entity "had knowledge or notice . . . [of] the perpetrator's *unlawful sexual conduct* as that term is defined in the statute to encompass particular prohibited acts with a minor." *Doe v. City of Los Angeles, supra,* at 546 (2007). In *Doe*, the Court rejected plaintiff's claim that by alleging defendants were "aware of circumstances that, if investigated, would have revealed [defendant] was a child molester," plaintiff had met the "constructive knowledge"

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[4] The Court should apply California Rules of Civil Procedure unless there is a "direct collision" with the Federal Rules. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (applying California Anti-SLAPP procedure for motion to strike and availability of attorneys' fees where they could exist "side by side" with Federal Rules of Civil Procedure 8, 12, and 56); *see also Walker v. Armco Steel*, 446 U.S. 740, 752 (1980).

requirement of section 340.1(b)(2). *Id.* As *Doe* explained:

> "[A] pleading that did no more than assert boilerplate allegations that defendants knew or were on notice of the perpetrator's past unlawful sexual conduct would not be sufficient nor would allegations of information and belief that merely asserted the facts so alleged without alleging such information that leads the plaintiff to believe that the allegations are true."

Id. at 551 n.5 (citation omitted).

Nor is there a duty of inquiry. *Deutsch v. Masonic Homes of California, Inc.*, 164 Cal. App. 4th 748 (2008), held that *Doe v. City of Los Angeles, supra* does not impose upon the entity *a duty of inquiry*, and that there is no duty of inquiry even in the face of "obvious and pervasive" evidence, at least when it comes to an adult over the age of 26 pleading sex abuse as a minor against a charitable entity. *Id.* at 774-75.

This is the best, however, the Complaint has to offer about notice. It is woefully lacking:

> In 1989 when concerns were raised to church officials about Hilliard and his interaction with children, those officials actively misinformed Michael's mother that [sic] about Hilliard's fitness to minister and supervise her child. On information and belief plaintiff alleges prior complaints of sexual abuse committed by Hilliard were made to church officials.

FAC ¶ 2.

This paragraph is carefully drafted to make it appear there was notice, but a close inspection shows none. As to what Plaintiff actually knows, he said that "concerns were raised" about Hilliard's "interaction with children." This type of notice, however, is inadequate under California law – in particular where charitable agencies routinely use volunteers to interact with children.

Plaintiff claims that "[i]n 1989 when concerns were raised to church officials about Hilliard and his interaction with children, those officials actively misinformed [Plaintiff's] mother that about [sic] Hilliard's fitness to minister and supervise her child." FAC ¶ 2. Plaintiff further states "[o]n information and

belief" that "prior complaints of sexual abuse committed by Hilliard were made to church officials." *Id.* This is insufficient.

Plaintiff also alleges on information and belief what might exist, that "prior complaints of sexual abuse [were] committed by Hilliard." FAC ¶ 2. But, against whom? Children? Adults? To whom was a complaint made and when?

Plaintiff's allegations are too flimsy to meet even this most basic requirement. He provides no information as to when or where these prior incidents of abuse occurred, who and when someone was told, which "church entity" was informed of the abuse, etc. "[E]ven under the liberal rules of pleading, a complaint must particularize the issue sufficiently to enable the defendant to prepare its defense." *Gorman v. Wolpoff & Abramson, LLP*, 370 F. Supp. 2d 1005, 1010 (N.D. Cal. 2005) citing *Gulf Coast Western Oil Co. v. Trapp*, 165 F.2d 343, 348 (10th Cir. 1947). The dearth of information renders it impossible for the LDS Church meaningfully to respond to or investigate Plaintiff's claim.

E. Plaintiff Has Not Stated a Claim for Negligence Per Se for Statutory Violations

Plaintiff's claims that Defendants violated numerous California Penal Code sections relating to the sexual abuse of minors. FAC ¶ 49. However, "negligence per se" is an evidentiary presumption and "does not provide a private right of action for violation of a statute." *Quiroz v. Seventh Ave. Center*, 140 Cal. App. 4th 1256, 1285-86 (2006) (holding that "negligence per se did not furnish appellant with an independent claim or basis for liability"). "[Negligence per se] operates to establish a presumption of negligence for which the statute serves the subsidiary function of providing evidence of an element of a preexisting common law cause of action." *Id.* Furthermore, Plaintiff has alleged no facts to support an assumption that the LDS Church violated any Penal Code section.

F. Plaintiff's Claim Is Barred By The California Statute Of Limitations

"If the running of the statute is apparent on the face of the complaint,

the defense may be raised by a motion to dismiss." *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). Statutes of limitations "in civil actions are procedural, not substantive." *Tietge v. Western Province of the Servites, Inc.*, 55 Cal. App. 4th 382, 386 (1997). "The term '[s]tatute of limitations' is the collective term applied to acts or parts of acts that prescribe the periods beyond which a plaintiff may not bring a cause of action." *Shirk v. Vista Unified School District*, 42 Cal. 4th 201, 211-12 (2007) (internal citations omitted).

California Code of Civil Procedure section 340.1 sets forth time limits for bringing a civil action based upon the sexual abuse of a minor. Under section 340.1(a), the time for commencement "shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later." Cal. Code Civ. Proc. § 340.1(a). This limitation applies to actions "for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff." *Id.* at § 340.1(a)(2). Section 340.1 thus imposes heavier burdens upon 26-year-olds to justify their case. They must file certificates of merit. They must show a "duty." They most show particularized notice that persons who are not 26-years-old must show, as discussed above in the "notice" argument.

Plaintiff filed his Complaint two days after his 26th birthday. Plaintiff claims, however, that the statute of limitations was tolled by the Soldiers and Sailors Relief Act because he served "approximately six months in the armed forces after turning 18." FAC ¶ 4. He claims that the 26-year-old rules do not apply to him.

The Soldiers' and Sailors' Civil Relief Act of 1940 ("Act"), 50 U.S.C. § 501 et seq., "suspends various civil liabilities of persons in military service."

Conroy v. Aniskoff, 507 U.S. 511, 512 (1993). The Act provides that "[t]he period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court . . . by or against the servicemember." 50 U.S.C. § 526(a). Plaintiff fails to provide any factual support for his claim that the statute is tolled. Plaintiff does not provide the date he went into the service, the date that his enlistment ended, nor the branch of the military of which he was a member. This information is important because "[a]lthough the Soldiers' and Sailors' Civil Relief Act provides for tolling during military service . . . the Act applies only to those individuals on active duty." *Davenport v. England*, 222 Fed. Appx. 551, 552 (9th Cir. 2007) (citation omitted).

The federal Act should not be construed as changing the section 340.1 rules which apply to 26-year-olds. The Soldiers' and Sailors' Civil Relief Act focuses upon a statute which "computes any period." The 26-year rule is not a "period." *See also McVeigh v. Doe 1*, 138 Cal. App. 4th 898, 904-05 (2006) (the running of the limitations period is not related to the obligation to comply with Cal. Civ. Proc. Code section 340.1(g)'s obligation to file certificates of merit for plaintiffs over 26 years of age); *Rafael v. Superior Court,* 1 Cal. App. 3d 457, 459 (1969) (tolling rule for a defendant previously out of state did not tack on additional time for plaintiff after he attained his majority, then 20). The federal Act thus has no impact upon the rules which apply to 26-year-olds.

Normally, the two-year limitations period of section 335.1 of the Code of Civil Procedure applies. But, section 340.1 of the Code of Civil Procedure, with a longer limitations period, applies to entities that have a **duty of care** to a minor who was allegedly sexually abused by somebody else, and to entities who committed an intentional act that was the legal cause of the abuse. Cal. Code Civ. Proc. § 340.1(a)(2) - (a)(3). Because the Complaint pleads insufficient "duty", the shorter two-year limitations applies.

Moreover, as discussed above, Plaintiff has not pleaded the requisite notice for section 340.1.

G. Plaintiff's Claims Are Barred By His Failure To Timely File Certificates Of Merit

A plaintiff who benefits from the enlarged statute of limitations in Code of Civil Procedure section 340.1 "must also assume its burdens." *Tietge v. Western Province of the Servites, Inc.*, 55 Cal. App. 4th 382, 387 (1997) (holding defendant could raise issue of plaintiff's failure to file the requisite certificates of merit upon remand). "The failure to file certificates [of merit by a mental health professional and a lawyer] in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to section 435." Cal. Code Civ. Proc. § 3401.1(l) ; *see Doyle v. Fenster*, 47 Cal. App. 4th 1701, 1707 ("[D]ismissal is impliedly permitted by defendant's remedy for the failure to file or the improper filing of the certificates, i.e., bringing a demurrer or a motion to strike."). Failure to timely file the requisite certificates of merit may "constitute unprofessional conduct and may be the grounds for discipline against the attorney." Cal. Code Civ. Proc. § 340.1(k) .

In addition to the statute of limitations set forth in subsections (a) and (b), section 340.1 contains protections for defendants to be "free from frivolous lawsuits." *See McVeigh, supra,* 138 Cal. App. 4th at 904. Subsection (g) provides that "[e]very plaintiff 26 years of age or older at the time the action is filed *shall file certificates of merit* as specified in subsection (h)." Cal. Code Civ. Proc. § 340.1(g) (emphasis added). Subsection (h) specifies three categories of required certifications. First, an attorney must certify that he has reviewed the facts of the case and consulted with at least one mental health practitioner and that based on such consultation, "there is reasonable and meritorious cause for the filing of the action." *Id.* at § 340.1(h)(1). Second, the consulted mental health practitioner must certify that "there is a reasonable basis to believe that the plaintiff had been

subject to childhood sexual abuse." *Id.* at § 340.1(h)(2) . Third, if it was not possible to file the (h)(1) and (h)(2) certificates when the action was filed "because a statute of limitations would impair the action," the attorney must submit a certification stating such and "the certificates required by paragraphs (1) and (2) *shall be filed within 60 days* after filing the complaint." *Id.* at § 340.1(h)(3) (emphasis added).

"It is a well-established rule of statutory construction that use of the word 'shall' denotes a mandatory requirement." *Hill v. United States I.N.S.*, 714 F.2d 1470, 1475 (9th Cir. 1983). Plaintiff filed his Complaint on March 21, 2008. According to the requirements of section 340.1(g), Plaintiff was required to file the (h)(1) and (h)(2) certificates of merit at the time he filed his Complaint because he was over the age of 26. Plaintiff failed to do so. Even if Plaintiff could show that a late filing was justified under (h)(3), Plaintiff would still only have 60 days from March 21, 2008 to file the (h)(1) and (2) certificates, with the (h)(3) certificate at filing. Cal. Code Civ. Proc. § 340.1(h)(3). Plaintiff would have had to file the (h1) and (2) requisite certificates by May 20, 2008. Again, he failed to do so.

Plaintiff will likely argue that his obligation to submit the certificates of merit was not triggered because his cause of action was within the statute of limitations based on his military service. However, as pointed out above, the 26-year-old rule is not a "period" that may be tolled. *McVeigh, supra,* 138 Cal. App. 4th at 901 (the requirement to file age 26 certificates is not related to the running of the limitations period). Dismissal is thus proper as Plaintiff has failed to meet this fundamental requirement of bringing his claim.

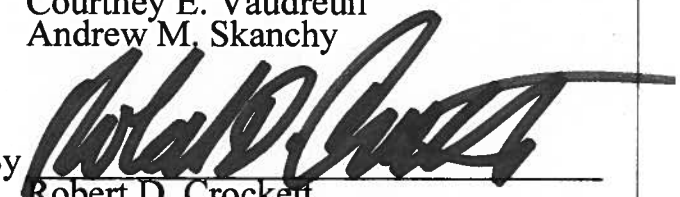
IV.

CONCLUSION

Even if Plaintiff could amend his Complaint again to provide more factual support for his claim, his failure to follow the required procedures under section 340.1 cannot be remedied. The LDS Church request that Plaintiff's Amended Complaint be dismissed with prejudice.

Dated: November 21, 2008

LATHAM & WATKINS LLP
Robert D. Crockett
Courtney E. Vaudreuil
Andrew M. Skanchy

By 
Robert D. Crockett
Attorneys for Defendants
Corporation of the Church of Jesus Christ of Latter-day Saints, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 355 South Grand Avenue, Los Angeles, CA 90071-1560.

On **November 21, 2008**, I served the following document described as:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

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Kiesel Boucher & Larson LLP
8648 Wilshire Boulevard
Beverly Hills, CA 90211

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **November 21, 2008**, at Los Angeles, California.

Nancy Renteria

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 355 South Grand Avenue, Los Angeles, CA 90071-1560.

On **November 21, 2008**, I served the following document described as:

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by serving a true copy of the above-described document in the following manner:

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I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents with the United States Postal Service; such documents are delivered to the United States Postal Service on that same day in the ordinary course of business, with postage thereon fully prepaid. I deposited in Latham & Watkins LLP' interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service:

Frederick Hilliard, Jr.
5406 13th Ave S
Gulfport , FL 33707-3512

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **November 21, 2008**, at Los Angeles, California.

Nancy Renteria